

Thanks for the Clarification

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This was a pretty decent week, wasn't it? Two clarifications have taken place in it, two knots in the windpipe of democracy in Europe have loosened a little bit, some more air comes through and with it also the strength to further tease open up these and other knots. On the one hand, it has been clarified whether Manfred Weber and many others in the European People's Party, under the gun, choose to be in Viktor Orbán's or Angela Merkel's camp. It has also been clarified what the head of German internal intelligence – officially called *Verfassungsschutz*, isn't that ironical? – Hans-Georg Maaßen was talking about lately when he called an internet video showing Nazi thugs running and kicking after foreigners in Chemnitz "not authentic" and "deliberate misinformation", a clarification that also removes all doubt about what we further have to think and expect of the guy and his employer Horst Seehofer and the German security apparatus in general. Both not exactly exhilarating, but it makes breathing easier. Now we know.

First to Orbán: On Wednesday, the European Parliament decided by a two-thirds majority to start proceedings under Article 7 of the EU Treaty against Hungary as a threat to democracy and the rule of law in the EU. That in itself is a huge issue, no matter what the outcome of the proceedings. The two partners in crime Poland and Hungary, as [Wojciech Przybylski](#) has pointed out, now face a classic prisoner's dilemma: Both are indicted now, so both will have to make up their minds whether to keep trusting the other to have one's back – or else throw the other under the bus and collect the reward before he does. In the absence of virtue, maybe coolly calculating reason will do the trick?

What's more: for the first time the whole political spectrum of Europe from left to right has been forced to declare themselves. Is Orbán a threat to Europe? For or against? Now, look at that: Sebastian Kurz is in favour in the end! Look at that: *Spitzenkandidat* candidate Manfred Weber as well! Look at that: Laurent Wauquiez and Silvio Berlusconi are against. Look at that: Pedro Casado's people dodge the vote! My, my, isn't that interesting.

The vote also revealed how deeply divided the EPP is on this central issue for the future of the EU before the upcoming EP elections. Voters, at least in Germany, tend to strongly disapprove of internal party infighting before elections, which seems rather logical to me: to break down conflicts into clear and polarised for/against decisions is why parties exist. After all, when you give those guys your vote you want to know what you get. Do I get Merkel or Orbán? If the EPP stays ambiguous and quarreling among themselves about that, it just doesn't do its job. All this can now

be addressed in brilliant clarity during the election campaign. European democracy works.

Legally, the vote might open another door to increase the pressure on the EPP. European parties are legally obliged to observe the values of Art. 2 TEU, too, and if they don't they may lose their registration and thereby access to EU party funding. EU law professors Alberto Alemanno and Laurent Pech, both familiar to the readers of *Verfassungsblog*, have addressed a [letter](#) to the European Parliament calling for the deregistration of the EPP. Further clarification can be expected.

Floundering about in a pool of lies

Now, on to the Maaßen case. The clarification here is of a different nature. The president of the Federal Office for the Protection of the Constitution had cast doubt on the "authenticity" of an Antifa video of Nazi attacks in Chemnitz and claimed to have "good reasons" for the assumption that it was "deliberate misinformation". Asked to explain himself, Maaßen let us know that he was by no means saying that the video was staged or faked. Dear me, no, not at all! All he meant to say was that he disagreed with the qualification as a "manhunt" under which the video had been posted on the internet. Because, that clearly did not qualify as a manhunt at all.

Now, neither I nor the federal government nor anybody else would be interested in hearing Mr. Maaßen's private opinion as to whether the term "manhunt" describes what you see in the video in a semantically correct way or not. The guy is head of a bloody intelligence service, isn't he? If uses the term *misinformation*, I expect him to come up with some piece of *information* that has those who speak of "manhunt" stand corrected. So, please, Mr. Maaßen, oblige us. Share your intelligence, will you?

But... no. No such thing.

Instead, his supporters act all offended and call the riot about Maaßen's clarification – I kid you not – a manhunt. [They do](#).

What is clarified by that is less the content of Maaßen's discourse than the method: Throwing out a statement that shocks and bewilders everybody but at the same time is so artfully ambiguous that one can withdraw afterwards to a supposedly harmless variant of interpretation and put on the air of persecuted innocence – doesn't that look familiar? Haven't we seen that before? Oh yes, we have, *ad nauseam*, too. That method has been driven to perfection by people like Bernd Höcke (who, a true master of the art, called the Holocaust memorial in Berlin a "Monument of Shame"), by Beatrix von Storch, by Alexander Gauland. You cover your own assertion with enough mucus of "don't be so delicate" and "just speaking my mind" until no critique can pierce that slimy cocoon and get to the core of the assertion's validity and factual truthfulness any more; on the contrary, it will all be reflected right back to

the critic who are exposed as scurrilous and hysteric disseminators of fake news. The good thing, though: For the time being, the message "Nazi violence is an Antifa invention" is out there for anyone who has ears to hear, and no-one can hold you responsible for that. Because you never meant it that way, did you? It's great. Works unfailingly.

I don't even need to know how much Maaßen sympathises with the AfD politicians with whom he meets, or with the Chemnitz demonstrators whom he publicly defends. I don't need to know about content, the method is fully sufficient. Maaßen, the Federal Minister of the Interior and most of the German security apparatus on his side and at his back, have entered the slide that goes right into that black bubbling pool of lies in which any understanding of what is true and valid is dissolved and becomes just a matter of political confession. Quaint Dr. Maaßen with his three-piece suit, his lawyer's face and his gold rimmed glasses is floundering and splashing about in this pool in the company of people who, if he were doing his job, should actually be under his professional surveillance. So that has been clarified this week, and I am very glad that the abject Social Democrats, in all their godforsakenness, still seem to have found the strength to not just let that matter rest for the sake of coalition stability, for the time being. May the clarification go on!

Not the first lapse

[CLAUS LEGGEWIE](#) already at the beginning of the week provided us with a wealth of context which throws the current clarification into stark relief: Maaßen's "latest lapse is still harmless in relation to the misconduct that accompanied his term of office from the very beginning. And even these are less significant than the entire event called *Verfassungsschutz*, which, for structural reasons, has been protecting the republic less than burdened it ever since 1950." (German)

As far as **Hungary**, but also **Poland** is concerned: [KIM SCHEPPELE](#) and [DAN KELEMEN](#) have answered to my last editorial by spelling out the necessity and legality of transfer cuts vis-à-vis these two countries. The problem, in their view, is not the lack of legal instruments but the lack of willingness on the part of the EU Commission to make use of them.

Speaking of the **EU** Commission: One definite highlight of the week on *Verfassungsblog* was our [online symposium on Jean-Claude Juncker's "Political Commission"](#), organised jointly with the *Leviathan* research project at the Hertie School of Governance in Berlin. [MARK DAWSON](#) took a close look at Juncker himself, [ALBERTO ALEMANNO](#) at Martin Selmayr and the "Better Regulation" program, [KENNETH ARMSTRONG](#) at Michel Barnier's Brexit negotiating job, and [MARCO GOLDONI](#) at the Commission's economic and euro-zone performance. [JORIS LARIK](#) scrutinizes its foreign, security and trade policy, CATHRYN COSTELLO and ELSPETH GUILD its dealing with the refugee crisis. And [DIMITRY](#)

[KOCHENOV](#) comes to the devastating conclusion that the politicisation of the Commission "has fundamentally undermined the EU's action in an area of most fundamental concern: its rule of law and democratic nature. The 'political Commission' will be remembered as an observer of the fading away of the idea of the EU as a strong Union of democracies."

In the **US**, special counsel Robert Mueller keeps probing into President Trump's Russia connection and its potentially criminal aspects. [SAMUEL BUELL](#) examines what actually happens under constitutional law when the elected head of state turns out to be a criminal.

In **Latvia**, elections will be held in October, which prompts [MADARA MELNIKA and JULIAN SENDERS](#) to investigate the complicated question of the right of former Soviet republics to keep anti-independence politicians out of parliament.

Bulgaria and other Eastern Europe countries have a gigantic problem with the European Court of Justice because of the inhumane conditions in their prison systems – a scandal far too rarely noticed, as highlighted by [RADOSVETA VASSILEVA](#).

In **India**, the Supreme Court has, to global acclaim, finally put an end to the criminalization of "unnatural carnal intercourse" and thus helped the LGBTQ community to assert their human rights. [KANAD BAGCHI](#) places the judgment in the context of transnational constitutionalism.

In **Germany** the cabinet has passed the draft bill for the introduction of a third sex, which does not satisfy [ANJA SCHMIDT](#) at all.

[ULF BUERMEYER and BIJAN MOINI](#) present the legal reasoning behind their current constitutional complaint against internet surveillance in **Germany**.

[EMANUEL TOWFIGH and JACOB ULRICH](#) investigate what can be expected from the new left-wing political movement "#Aufstehen" in terms of revitalizing the **German** party system.

Churches in **Germany** have enjoyed a privileged position in terms of their constitutionally protected right to subject their employees to their doctrines at the expense of their fundamental rights. Now, the European Court of Justice has issued a momentous ruling. HANS MICHAEL HEINIG's first thoughts can be found [here](#), in our new format "VB vom Blatt". [ALEXANDER TISCHBIREK](#) wonders how this robust statement from Luxembourg will resonate with Karlsruhe (all German).

Another statement of considerable robustness by the **European** Court of Justice, the verdict on investor-state arbitration courts in *Achmea*, is challenged in the recent arbitration decision in the *Vattenfall v Germany* case – elaborated by [ANDREJ LANG](#).

[KAHRAMAN ALTUN](#) and [JOHANNES MÜLLER](#) investigate what the **UK** and its economy are facing in the case of a No-Deal-Brexit under the regime of the WTO.

In international law, **Serbia** and **Kosovo**, with their planned "land swap" deal, are preparing to enter new and, according to many, rather dangerous territory. [ALEKSANDAR PAVKOVI#](#) describes three possible scenarios how the international community could react to this.

Elsewhere

[ÁLVARO OLEART](#) believes that the **EU** has won a battle against the "nationalist international" with the Hungary vote, but that the winner of the war could be Manfred Weber (Spanish).

[BERND PARUSEL](#) describes how **Sweden** regulates the "change of lane" of rejected asylum seekers into the regime of immigration law, a topic hotly debated in Germany (German).

[MARK VARSZEGI](#) considers the plans in **Hungary** to eradicate gender studies from university curricula to be a further democratic vertebra fracture and, on top of that, illegal (German).

[STEVE PEERS](#) takes a critical look at the planned tightening of the **EU** Return Directive and the regulations on deportation detention.

[PHILIP ALLOTT](#) considers the two-year period for the Brexit to be unrealistically short and calls for it to be extended in order to allow the **UK** an orderly withdrawal.

[GAURI PILLAI](#) examines the impact of the **Indian** Supreme Court's ruling on LGBTQ's rights on intersectional discrimination.

[TERESA FREIXES](#) asks how the integrationist **Spanish** constitution can leave room for bilateral negotiations between the state on the one hand and the province of Catalonia on the other (Spanish).

So much for this week. All the best to you, and take care,

Max Steinbeis

